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IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF TREASURY, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,
Petitioner,

v.

CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court clearly erred when it found that the disclosure of individual names and addresses in the firearms trace database and the multiple sales database does not constitute an unwarranted invasion of personal privacy within the meaning of Exemption 7(C) of the Freedom of Information Act.

2. Whether the district court clearly erred when it found that disclosure of the firearms trace database could not reasonably be expected to interfere with law enforcement proceedings within the meaning of Exemption 7(A) of the Freedom of Information Act.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Under the Gun Control Act, all licensed firearms importers, manufacturers, and dealers must maintain records of their sale or other disposition of firearms. See 18 U.S.C. § 923(g)(1)(A) (2000). In particular, prior to transferring a firearm at retail, a licensee must identify on a prescribed form the transferee's name, address, date and place of birth, height, weight, and race and identify the firearm transferred by manufacturer, model, and serial number. See 27 C.F.R. § 178.124 (1999). During either a criminal investigation of any person other than the licensee or an annual compliance inspection, the Secretary of the Treasury is entitled to inspect these records without a warrant or cause to believe that the licensee has violated the law. See 18 U.S.C. § 923(g)(1) (2000). Licensees must provide to the Secretary of the

Treasury within 24 hours of a request any "information contained in the records required to be kept . . . for determining the disposition of one or more firearms during the course of a bona fide criminal investigation." *Id.* § 923(g)(7). In addition, whenever a licensee transfers two or more handguns to a nonlicensee within five consecutive business days, the licensee must report the multiple sale to the office designated by the Secretary and to the state and local law enforcement agencies having jurisdiction at the location of the transfers. See *id.* § 923(g)(3)(A).

Utilizing this statutory framework, the Bureau of Alcohol, Tobacco, and Firearms ("ATF") traces the disposition of firearms by federal licensees at the request of more than 17,000 law enforcement agencies, processing more than 200,000 trace requests annually and reporting the results to the requesting agency. R. 21, Ex. 2, ¶¶ 12, 19, 28. After a firearm is recovered and a trace is requested by the law enforcement agency conducting the investigation, ATF contacts a firearm's manufacturer, wholesaler, and retailer to trace its disposition. Pet. App. 35a-36a. ATF has encouraged major cities, including Chicago, to trace all firearms recovered in the course of criminal investigations in order to help ATF and the participating jurisdictions better analyze, identify, and investigate patterns of illegal gun trafficking. See Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of Treasury, *Crime Gun Trace Reports (2000): National Report* 1-2 (July 2002) [hereafter cited as "*Gun Trace Reports*"]; Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of Treasury, *Youth Crime Gun Interdiction Initiative, Crime Gun Trace Reports: The Illegal Youth Firearms Markets in 27 Communities* 1-2 (Feb. 1999) [hereafter cited as "*Youth Crime Gun*"].

ATF maintains comprehensive databases containing the information generated by its firearms traces and reports of multiple sales. R. 76-1 at 127. These databases contain no

information indicating whether an investigation relating to any firearm is currently open or closed. Pet. App. 37a-38a. They also do not identify suspects, witnesses, or anyone who has been interviewed during the course of an investigation. Pet. App. 65a, 67a-68a.

ATF's own analysis of trace data reveals that most crime guns are sold by a small and readily identifiable number of manufacturers and dealers. See *Gun Trace Reports*, *supra* at 46-47; Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of Treasury, *Commerce in Firearms in the United States* 2, 22-25 (Feb. 2000) [hereafter cited as "*Commerce in Firearms*"]; *Youth Crime Gun*, *supra* at vii. Chicago has reached the same conclusion; and, on the basis of its own analysis of patterns of firearms trafficking and the results of an undercover investigation targeted at firearms dealers that most frequently sell weapons later recovered and traced, Chicago has brought a civil suit against a number of firearms manufacturers, wholesalers, and dealers alleging that they unreasonably facilitate the unlawful possession and use of firearms in Chicago and therefore constitute a public nuisance under Illinois law. See, *e.g.*, John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role For Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Experience*, 52 S.C. L. Rev. 287 (2001). See also *Young v. Bryco Arms*, 765 N.E.2d 1 (Ill. App. Ct. 2002).

In late 1998, the City of Chicago submitted a request under the Freedom of Information Act ("FOIA") to ATF, seeking disclosure of nationwide data from its trace and multiple sales databases. ATF denied the request, although it promised to provide the information if the City formally withdrew its FOIA request and sought the information pursuant to the Gun Control Act. Pet. App. 21a. The City complied, but ATF failed to provide the requested information. Pet. App. 21a. After several further requests for the information, the City again filed a formal FOIA request on March 3, 2000. Pet.

App. 21a. On March 8, 2000, ATF sent the City a zip disk compiled from its databases withholding information identifying the names and addresses of the manufacturers, importers, wholesalers, and dealers that had sold firearms later recovered and traced as part of a criminal investigation; the names and addresses of the purchasers of those firearms as well as the identities of those in possession of the firearms when they were recovered and their associates; the locations where the weapons were recovered; and the serial numbers and manufacture date of the recovered firearms. R. 8 at 6-16. ATF also withheld from the national multiple sales database the identity of the manufacturers, wholesalers, and retailers that had sold the firearms, as well as information identifying the purchasers, the date of purchase, the number of firearms purchased, and information about the type of firearms purchased. R. 8 at 18-31. The City then brought suit against ATF under FOIA seeking the withheld information on June 7, 2000. Pet. App. 22a.

In the ensuing litigation, ATF eventually claimed that its policy was to claim the following exemptions for varying amounts of time: under the exemption for material the disclosure of which could reasonably be expected to interfere with law enforcement proceedings, all trace data for one year and all multiple sales data for two years; under the same exemption, the identity of the agency requesting traces, the serial numbers of traced firearms if they were involved in multiple sales, the identity of importers and dealers that sold traced firearms, and the dates of purchase, for five years; and under the exemption for material the disclosure of which would constitute an unwarranted invasion of privacy, the identity of purchasers of multiple handguns, purchasers of firearms later traced by ATF, the possessors of traced guns and their associates at the time the guns were recovered, and the location where traced guns are recovered, permanently. Pet. 5. ATF supported its claim to exemptions primarily with a statement by ATF Assistant Director for Field Operations

David L. Benton ("Benton"). See Pet. App. 31a-71a.[1] The City supported its claim for full disclosure with several affidavits from Gerald A. Nunziato ("Nunziato"), a former ATF special agent employed by the agency for more than 28 years and, from 1991 to 1998, in charge of developing the requirements for the tracing process and the software to support it as well as supervising all requests for information at ATF's National Tracing Center. Nunziato testified that none of the information the City is seeking is likely to interfere with any investigation because any truly sensitive information is not placed in the databases in question, R. 35, Ex. J, and because information similar to that now being withheld has been released in the past without causing any interference, R. 25, Ex. F. Nunziato also noted that the information sought could shed light on ATF's performance of its duties. R. 38, Ex. O. Law enforcement officials responsible for investigations that involve trace requests from St. Louis, Chicago, Detroit, and Camden County, New Jersey, submitted affidavits affirming that their investigations would not be jeopardized by the release of any information in the databases. R. 35, Exs. K, L, M; R. 38, Ex. P.

On the parties' cross-motions for summary judgment, the district court ruled that an evidentiary hearing was warranted. Pet. App. 4a-5a. At the hearing, ATF called three witnesses, two of whom—ATF Disclosure Division Chief Dorothy A. Chambers; and National Tracing Center Chief Forest Webb—testified to the importance of withholding the information in question. See R. 76-1, 76-2. The City called two witnesses, one of whom—Nunziato—testified that the information could

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[1] ATF also produced letters from leaders of the Fraternal Order of Police and the Law Enforcement Steering Committee urging a law enforcement exemption for trace data. See R. 21. Several other statements were presented arguing that ATF had never before released the kind of information sought by the City. R. 34, Exs. A, C, E, "A" (second so labeled).

be released without compromising investigations. See R. 76-2. After the evidentiary hearing, the district court entered judgment in favor of Chicago. The court found that the privacy exemption, 7(C), does not apply because the information does not constitute an unwarranted invasion of privacy, and that the law enforcement exemption, 7(A), does not apply because ATF had failed to explain adequately how the information could interfere with law enforcement proceedings. See Pet. App. 24a-25a, 27a.[2]

The court of appeals affirmed. On the law enforcement exemption, the court acknowledged that any "potential for interference" involving either "open or prospective investigations" would be sufficient to invoke the exemption, but held that "ATF has not affirmatively established any potential interference of this nature." Pet. App. 7a-8a. On the privacy exemption, the court concluded that disclosure would not be an unwarranted invasion of privacy, because "[d]isclosure of the records sought by the City will shed light on ATF's efficiency in performing its duties and directly serve FOIA's purpose in keeping the activities of government agencies open to the sharp eye of public scrutiny." Pet. App. 15a. ATF's petition for rehearing en banc was denied with the panel adding a paragraph to its opinion explaining: "ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial, realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records." Pet. App. 18a.

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[2] The district court rejected a third claim of exemption, for personnel and medical records, which ATF has now abandoned. See Pet. App. 23a-24a; Pet. 11 n.7. Moreover, in an alternative finding, the district court ruled that to the extent that any privacy interest was at stake, it could be fully protected through encryption of the names and addresses of all individuals in the databases without placing any significant burden on the agency or requiring the creation of new documents. See Pet. App. 27a-30a. The court of appeals found it unnecessary to reach this issue. See Pet. App. 15a-16a.

ARGUMENT

As this Court has explained, "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 242 (1978). Hence, "the Act is broadly conceived," and "its basic policy is in favor of disclosure." *Id.* at 220. Indeed, the Act places the burden on the agency to demonstrate that the material at issue is exempt from disclosure. See 5 U.S.C. § 552(a)(4)(B) (2000). Moreover, the reasonableness of any claim to an exemption must be weighed against "the strong presumption in favor of disclosure." *Robbins Tire*, 437 U.S. at 236. And, in light of this presumption, exemptions to FOIA's disclosure requirement should be construed narrowly. See, *e.g.*, *Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 7-8 (2001); *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

This case involves a highly fact-bound dispute resolved by the district court after an evidentiary hearing held to weigh the conflicting evidence that the parties had submitted on ATF's claim to exemptions from FOIA's disclosure requirement. Even ATF does not claim that the district court was obligated to credit its evidence without inquiry; under FOIA, the decision whether material is exempt from disclosure is properly for the district court and not the agency. As this Court observed in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), "[u]nlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, FOIA expressly placed the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" *Id.* at 755 (quoting 5 U.S.C. §§ 552(a)(3) & 552(a)(4)(B) (2000)) (footnote omitted). And, indeed, the district court ultimately found that

disclosure of the information at issue here neither constitutes an unwarranted invasion of privacy within the meaning of FOIA's Exemption 7(C), 5 U.S.C. § 552(b)(7)(C) (2000), nor could reasonably be expected to interfere with law enforcement proceedings within the meaning of FOIA's Exemption 7(A), *id.* § 552(b)(7)(A). Affirming, the court of appeals concluded that the district court's findings were not clearly erroneous.

In its decision, the court of appeals followed settled law: on the privacy exemption, the court of appeals balanced the privacy interests implicated by disclosure of the data at issue against the value of its disclosure, concluding that disclosure would not work an unwarranted invasion of privacy; and on the law enforcement exemption, the court of appeals found that the district court had properly concluded that disclosure of trace data could not reasonably be expected to interfere with law enforcement proceedings. Now, in its petition, ATF's primary complaint is that the lower courts erred when evaluating the strength of its evidence. The petition, however, does not even discuss the evidence we adduced, which amply supports the district court's findings. Equally important, ATF does not quarrel with the court of appeals' observation that the findings of a district court in FOIA cases are reviewed only for clear error. See Pet. App. 5a; see also Fed. R. Civ. P. 52(a). In fact, the petition raises only highly fact-bound issues of no general significance for litigation under FOIA, and given the substantial evidence in the record supporting the district court's findings, plenary review is unwarranted.

1. The courts below correctly rejected ATF's reliance on Exemption 7(C), which exempts from disclosure information "to the extent that production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (2000). The information at issue here involves little, if any, cognizable privacy

interests, since the purchase of firearms, occurring within an industry subject to intensive regulatory scrutiny, is not private in any meaningful sense. Moreover, because disclosure of this information can help the public evaluate whether ATF is adequately discharging its own responsibilities, disclosure is fully "warranted" within the meaning of Exemption 7(C).

a. ATF notes that even non-confidential information about the involvement of particular individuals in government investigations is frequently treated as private within the meaning of Exemption 7(C). See Pet. 13. From this, ATF concludes that "[*a*] *fortiori*, disclosure of a firearms purchaser's name and address to a limited class of government officials who have access to *non-public* files does not negate the individual's privacy interest in avoiding indiscriminate release of that information to the general public pursuant to FOIA." Pet. 13-14 (emphasis in original). But ATF's conclusion does not follow from its premise; none of the cases on which ATF relies considers the unique characteristics of the firearms industry, where expectations of privacy are sharply circumscribed.

In general, business records involving commercial activities that are subject to government inspection and regulation are nevertheless considered private. See, *e.g.*, *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311-15 (1978). But this principle does not apply to the firearms industry. In *United States v. Biswell*, 406 U.S. 311 (1972), for example, the Court, in upholding warrantless inspections of the premises of federally licensed firearms dealers, observed that "close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating firearms traffic within their borders." *Id.* at 315. Moreover, "inspection is a crucial part of the regulatory scheme, since it assures that weapons are distributed through regular channels and in a traceable manner and makes possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms." *Id.* at

315-16. Accordingly, "when a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *Ibid.*[3]

It follows that those who purchase firearms are also on notice that the records of those purchases are subject to intensive scrutiny, and are therefore in no meaningful sense private. Indeed, since *Biswell*, regulation has become even more intensive; now all firearms purchases must be reviewed by appropriate federal, state, or local authorities. See 18 U.S.C. § 922(s) & (t) (2000). Moreover, as we explain above, multiple purchases must be reported to federal, state, and local authorities, without any statutory restriction on the further dissemination or use of that information; and the records of all other transactions are subject not only to regulatory scrutiny during compliance inspections and regulatory investigations, but also must be provided to ATF when it conducts a trace, again with no statutory restriction on the dissemination or use of that information by ATF or the federal, state, or local law enforcement agency that receives the trace results.[4] Accordingly, there is simply no reasonable expectation of privacy involved in the purchase of firearms.

[3] To be sure, *Biswell* is not controlling here; Exemption 7(C) is not limited to information that is considered private for purposes of the Warrant Clause or under other constitutional provisions. See *Reporters Committee*, 489 U.S. at 762 n.13. But the reasoning of precedents that address the scope of protected privacy interests usefully informs analysis under Exemption 7(C). See *id.* at 762-63.

[4] ATF notes that the Gun Control Act forbids any system of registration for firearms purchases. See Pet. 16-17 (citing 18 U.S.C. § 926(a) (2000)). In this case, however, the data we have sought is not subject to that statutory restriction. Only multiple sale and trace data is at issue here, and as we explain above, that data must be reported to the authorities, with no statutory restriction on its subsequent dissemination or use.

See, *e.g.*, *United States v. Marchant*, 55 F.3d 509, 516 (10th Cir.), cert. denied, 516 U.S. 901 (1995); *Center To Prevent Handgun Violence v. United States Department of Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997). And the recovery of a firearm by the authorities in the course of a criminal investigation is even less private. Once the authorities have seized a firearm, its possessor surely loses any meaningful privacy interest in the weapon or the circumstances of its recovery—nothing offers possessors confidentiality with respect to those facts.

ATF claims that the court of appeals erred by failing to recognize that a privacy interest inheres in the disclosure of names and addresses "in connection with a criminal law enforcement investigation." Pet. 15. As to multiple sales data this argument has no merit at all, since the multiple sales data does not indicate whether any investigation has ever been conducted with respect to the multiple sales described in the data. Even as to trace data, ATF's position considerably overstates things. This Court has explained that FOIA does not shield information from disclosure "simply because it was found in an investigatory file." *Robbins Tire*, 437 U.S. at 230. Thus, Exemption 7(C) does not categorically exclude from disclosure any information identifying particular individuals who came to the attention of the authorities during an investigation; only disclosures amounting to an "unwarranted invasion of privacy" are within the exemption.[5] Moreover, the data at issue contains only highly limited information about particular individuals—it discloses only the identity of the purchaser of a firearm that was later recovered in the

[5] Congress has itself acknowledged this point. The Privacy Act, which ordinarily forbids disclosure of information in agency records about particular individuals, specifically exempts information subject to disclosure under FOIA, recognizing that information identifying particular individuals is not categorically exempt from disclosure under FOIA. See 5 U.S.C. § 552a(t)(1) (2000).

course of a criminal investigation, and the identity of the person from whom the firearm was recovered by the authorities and his associates present at that time. This information does not reveal whether anyone violated any law or was a subject or witness in a criminal investigation.[6] There is no precedent for treating information of this character as private, especially when it involves a closely regulated commodity such as a firearm.

ATF relies on precedents holding that records reflecting the nature of an individual's involvement in a criminal investigation, such as records reflecting individuals' arrest records or involvement in investigations as witnesses or interviewees, can be considered private within the meaning of Exemption 7(C). See Pet. 13-16. In this case, however, the information at issue does not identify suspects, witnesses, or even people interviewed in connection with an investigation. Disclosure of this data could, at most, encourage some to speculate about how the individuals identified in the data may have been involved in the criminal process, but the case law makes clear that the possibility of that type of speculation does not constitute a reasonable expectation of an invasion of privacy. See, *e.g.*, *Rose*, 425 U.S. at 380 n.19 (threat to privacy must be "more palpable than mere possibilities"); *Arieff v. United States Department of Navy*, 712 F.2d 1462, 1468 (D.C. Cir. 1983) (Scalia, J.) (document itself and not speculation must constitute invasion of privacy).

The cases that ATF cites fall into three categories: (1) when the named person is actually identified as a suspect, witness, or interviewee in a particular law enforcement investigation, see, *e.g.*, *Reporters Committee*, 489 U.S. at 780

[6] Indeed, Benton, on whom ATF exclusively relies, acknowledged that "many of the persons whose names and/or addresses are in the [trace database] are not suspects or defendants" and that "ATF cannot distinguish the innocents from the suspects because it lacks sufficient information from the requesting agencies." Pet. App. 65a.

(FBI arrest and conviction histories); *Neely v. FBI*, 208 F.3d 461, 463-65 (4th Cir. 2000) (individuals interviewed or mentioned in "connection with particular [criminal] investigations"); *Manna v. Department of Justice*, 51 F.3d 1158, 1166 (3d Cir.) (suspects, witnesses, and interviewees in specific criminal investigation of mob boss), cert. denied, 516 U.S. 975 (1995); *Landano v. United States Department of Justice*, 956 F.2d 422, 426 (3d Cir. 1992) (suspects, witnesses, and interviewees in specific murder investigation), aff'd in part & rev'd in part on other grounds, 508 U.S. 165 (1993); *Burge v. Eastburn*, 934 F.2d 577, 579 (5th Cir. 1991) (individuals who made statements to police in specific murder investigation); *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) (suspects and witnesses in particular stock fraud investigation); *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (name in FBI investigative file concerning disappearance of international political activist); *Senate of Puerto Rico v. United States Department of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (suspects, witnesses, and informants in particular murder and police corruption investigation); (2) when revealing the name would also reveal other identifiable and potentially embarrassing information, see *Halloran v. Veterans Administration*, 874 F.2d 315, 321 (5th Cir. 1989) (names connected with private comments on work, job performance, co-workers, clients, and friends); and (3) when the names and addresses are attached to other personal information that could lead to unwelcome junk mail and other solicitations, see, *e.g.*, *Bibles v. Oregon Natural Desert Association*, 519 U.S. 355 (1997) (per curiam) (names and addresses on Bureau of Land Management mailing list); *United States Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994) (home addresses (but not names) of federal employees who have not disclosed their addresses to their union); *FLRA v. United States Department of Defense*, 977 F.2d 545, 549 (11th Cir. 1992) (home addresses coupled with federal employment positions); *United States Depart-*

ment of Navy v. FLRA, 975 F.2d 348, 353 (7th Cir. 1992) (same); *National Association of Retired Federal Employees v. Horner*, 879 F.2d 873, 876 (D.C. Cir. 1989) (names and addresses coupled with identification as retired or disabled persons receiving monthly federal annuity checks).

The information at issue here does not fall into any of these categories. It is different from the first category because it does not identify anyone as a suspect, witness, interviewee, or otherwise participating in some fashion in a criminal investigation. It is different from the second category because the names are not connected with any potentially embarrassing information. There is nothing either private or embarrassing about having bought two or more guns in one week or purchasing a gun that was later traced by police; this is at most discrete information about commercial transactions in a closely regulated industry. And it is different from the third category because this information does not reveal anyone's employment or indeed anything other than facts relating to a commercial transaction in a closely regulated industry. Nor is disclosure likely to subject firearms purchasers or possessors to unwanted commercial solicitation; purchasers identified in the data have already revealed their names and addresses to dealers and are already subject to whatever marketing attention the dealer deems appropriate or profitable, and the names of possessors and associates are not likely to attract any commercial attention because there is not enough other information to make them of any particular commercial interest.

Moreover, even in the cases cited by ATF, the courts have not considered the privacy interest at stake very strong. For example, with respect to data disclosing the addresses of federal employees, this Court wrote only that the privacy interest at stake was "not insubstantial." *Department of Defense v. FLRA*, 510 U.S. at 500. The D.C. Circuit has found the interest in names and addresses attached to information about federal retirement or disability benefits merely "more than de minimis." *National Association of*

Retired Federal Employees, 879 F.2d at 878. The Third Circuit has held that even the privacy interest in the names of witnesses and interviewees in federal investigative files used to convict a powerful mafia boss "may become diluted with the passage of time." *Manna*, 51 F.3d at 1166. The only reason the courts found these possibly very slight invasions of privacy unwarranted is because there were no cognizable public interests to balance against them: "we 'need not linger over the balance' because 'something . . . outweighs nothing every time.'" *Ibid.* (quoting *National Association of Retired Federal Employees*, 879 F.2d at 879); see also *Bibles*, 519 U.S. at 355 (no public interest relevant to FOIA identified); *Department of Defense v. FLRA*, 510 U.S. at 500 ("a very slight privacy interest" outweighs "the virtually nonexistent FOIA-related public interest"). In this case, however, the lower courts found that powerful public interests counseled in favor of disclosure. That means that even if the lower courts undervalued the privacy interest at stake, this case would nevertheless come out the same way because the public interests outweigh even a cognizable privacy interest, as we now explain.

b. Even a disclosure of otherwise private facts can be "warranted" within the meaning of Exemption 7(C) when it advances "the citizens' right to be informed about what their government is up to." *Reporters Committee*, 489 U.S. at 773. The court of appeals followed this test precisely, concluding that disclosure of the requested information will aid the public in evaluating "ATF's performance of its statutory duties of tracking, investigating and prosecuting illegal gun trafficking, as well as determining whether stricter regulation of firearms is necessary." Pet. App. 14a-15a. ATF, for its part, contends only that the lower courts misapplied this test because disclosure of the information at issue would not assist the public in evaluating the efficacy of firearms regulation. See Pet. 14. But ATF does not even discuss the evidence supporting the findings below.

Nunziato, in uncontroverted testimony, explained that if individual names are identified, analysis of trace and multiple sales data can assist the public in determining whether ATF is properly identifying dealers and individuals who display indicia of involvement in illegal gun trafficking, and who therefore warrant further investigation. See R. 35, Ex. J, ¶ 13; R. 38, Ex. O, ¶¶ 26-28. Indeed, ATF publishes its own analysis of tracing and multiple sales data, which it believes tends to identify patterns of illegal gun trafficking. See *Gun Trace Reports*, *supra* at 1-2; *Commerce in Firearms*, *supra* at 2, 22-25; *Youth Crime Gun*, *supra* at 12. Independent scholars agree that analysis of this data provides an important pool for evaluating investigative techniques in gun control policy. See, *e.g.*, Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 Ariz. L. Rev. 277 (2001). Nevertheless, by withholding data identifying purchasers, possessors, and associates, ATF prevents the public from learning whether this information helps to identify the characteristics of dealers or purchasers that increase the likelihood that the firearms that they traffic will wind up in the hands of criminals. Suppressing this data also prevents the public from learning whether ATF effectively targets "high risk" dealers and sales for adequate investigation, or, more generally, whether additional legislation is warranted to address "high risk" dealers and sales.

Accordingly, disclosure of the information at issue in this case falls squarely within the public policy identified by the courts as sufficient to warrant disclosure even in the face of a cognizable privacy interest. And for this reason, ATF's reliance on cases where a minimal privacy interest carried the day because the data at issue shed no light on the operations of government is wholly unavailing here. Rather, in light of the substantial public need for disclosure, ATF was required to prove a substantial invasion of important privacy concerns, and it simply never mustered the evidence to do that.

Finally, ATF contends that the court of appeals erred by ascribing significance to Chicago's interest in obtaining this data in order to improve its enforcement of its own gun control laws. See Pet. 17-18. This myopia is distressing. Even ATF acknowledges that one of its "critical missions" is "assisting State and local law enforcement agencies in enforcing their own firearms laws . . . ." *Youth Crime Gun*, *supra* at vii. Thus, to the extent that ATF fails to disclose information that may assist local governments in combating illegal firearms trafficking, it fails to do its job. On this basis, the court of appeals correctly held that "[d]isclosure of the records sought by the City will shed light on ATF's efficiency in performing its duties and directly serve FOIA's purpose in keeping the activities of government agencies open to the sharp eye of public scrutiny." Pet. App. 15a. To be sure, we anticipate that the information we seek will assist us in prosecuting our suit against scofflaw gun manufacturers and dealers, as both lower courts noted. See Pet. App. 14a, 24a. That, however, does not diminish the strong FOIA-related public interest in this information that both courts have recognized.

2. The courts below also correctly rejected ATF's reliance on the exemption for information that, if disclosed, "could reasonably be expected to interfere with enforcement proceedings . . . ." 5 U.S.C. § 552(b)(7)(A) (2000). While ATF boldly claims that disclosure of firearms trace data "threatens substantial harm to law enforcement," Pet. 20, it fails to come to grips with the fact that the trace information at issue is not in any meaningful sense confidential—it reveals virtually nothing that the subjects of an investigation are not already likely to know.[7]

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[7] ATF has abandoned its reliance on Exemption 7(A) to support withholding multiple sales data. See Pet. 9 n.6.

ATF's witness Benton speculated that disclosure of trace data will alert suspects to the existence of an investigation, and provide them with an opportunity to obstruct it. See Pet. App. 38a-43a. Nunziato and law enforcement officials from St. Louis, Chicago, Detroit, and Camden County, however, all asserted that the trace database contains primarily non-sensitive raw data, which does not indicate "whether an investigation of any type is ongoing or contemplated with respect to a particular person or a particular gun." R. 35, Ex. J, ¶ 8; see also R. 35, Exs. K, L, M; R. 38, Ex. P. Nunziato pointed out, as an example of this general point, that an investigation of an arms dealer who sold over 600 guns used in crimes between 1989 and 1998 was not compromised by the public disclosure of the trace data on these guns in many FOIA data releases. See R. 35, Ex. J, ¶ 8. Nunziato also established that when trace data is potentially sensitive, it is clearly identified as such and already adequately shielded from release. See R. 35, Ex. J, ¶¶ 7, 14-16.

Our witnesses' testimony was properly credited by the district court. Firearms cannot be traced until they have been recovered by the authorities—almost always as the result of a search of a suspect or arrestee—and that fact alone tells both the individual from whom the weapon was taken and his associates that an investigation is underway. Consequently, a disclosure of trace results under FOIA will not alert the subjects to the fact that an investigation has begun—that will be evident from the moment that the firearm is seized by the authorities. Moreover, the tracing process itself destroys whatever confidentiality might remain, because it requires that firearms manufacturers, wholesalers, and retailers be contacted and told that a trace has been requested. The trace request therefore alerts these entities that an investigation is underway, and enables them to tip off the target if they are inclined to do so; indeed, they might be targets themselves. Thus, not only is the tracing process not confidential, but it is the recovery of the firearms by the authorities and the

subsequent request to dealers and others for information about those firearms, not any disclosure under FOIA, that alerts the outside world to the existence of an investigation. Nor does trace data reveal any of the sensitive details of an investigation. As we explain above, trace data does not identify any prospective witnesses; it identifies only the person from whom the firearm was recovered and his associates. The identities of those persons, of course, are not confidential, but instead are known to everyone present at the time of recovery, and to anyone else whom those persons may tell.

In any event, if confidentiality is important, the requesting agency can utilize a special code telling ATF not to contact the dealer that sold the firearm, and Chicago has not requested this data. R. 35, Ex. J, ¶¶ 7, 14, 16.[8] ATF, however, asserts that "'do not contact' traces are relatively rare, constituting approximately 1% of all traces." Pet. 20 n.10. This fact merely emphasizes the minuscule amount of potentially sensitive information in the trace database. And while ATF also asserts that "nothing in the record suggests that the 'do not contact' traces as a group are more sensitive from a public disclosure perspective than other firearm traces," *ibid.*, this claim discloses unfamiliarity with the record. As we note above, Nunziato and the other law enforcement witnesses all testified that ordinary trace data is nonsensitive.

ATF is equally mistaken in suggesting, without citing anything in the record, that information in the trace database "related to homicides and other violent crimes in which the dealer is not a suspect" is just as sensitive as information marked with a "do not contact" code. Pet. 20 n.10. There is nothing particularly sensitive about the trace of a firearm used

[8] ATF itself uses special codes when it wishes to conceal the identity of a dealer in its trace database, and we have not requested that trace data either. R. 35, Ex. J, ¶ 15.

in a violent crime—the offender will almost certainly already know that an investigation of that crime is underway. And in the unlikely event that an investigation is ongoing but the recovery of a firearm or its subsequent trace has somehow not alerted the subjects that an investigation is underway, nothing in the trace database will alert the subjects to the progress and direction of the investigation or reveal the identity of potential witnesses.[9]

Importantly, ATF does not argue that any of the district court's findings are clearly erroneous, nor does it doubt the applicability of this deferential standard for review of the district court's findings. Instead, ATF claims only that "[t]he

[9] ATF's witness Benton attempted to identify only two hypothetical scenarios in which disclosure of trace data could alert a suspect to the existence of a previously undisclosed investigation. First, he claimed that disclosure could compromise an ongoing undercover investigation. See Pet. App. 48a-49a. He did not claim, however, that weapons obtained by an undercover operative during the course of his investigation would ever be traced; as we explain above, because tracing tells third parties that a firearm is in the hands of the authorities, the tracing process itself compromises the confidentiality of an investigation. For just that reason, when an undercover agent obtains a weapon while acting undercover, he would certainly not have it traced because of the risk that the trace would alert others to his real identity. Second, Benton claimed that disclosure of trace data would tell a criminal who had discarded a weapon that it had been recovered and that the authorities "could be closing in on him prior to the time that the police are ready to arrest him." Pet. App. 53a. This scenario is, at the outset, wildly implausible—we know of few criminals on the run who make FOIA requests and even fewer with the ability to comprehend ATF's highly technical data. But even if Benton's hypothetical criminal made a request, waited weeks if not months for an answer, and if the police somehow failed to make an arrest until after ATF had answered the request and disclosed that the firearm had been recovered, that fact would tell the target of the investigation nothing about the progress of the investigation. Besides, ATF adduced no evidence to show that this scenario occurs with any frequency at all, much less with sufficient frequency to justify withholding the entire trace database for substantial periods of time.

court of appeals wholly failed to articulate any cogent rationale for its rejection of ATF's evidentiary submission." Pet. 25. But the court of appeals made its rationale plain—it found no clear error in the district court's view that ATF's witness Benton had offered only wildly implausible speculation in support of his view that the disclosure of trace data would be likely to interfere with law enforcement proceedings. See Pet. App. 7a-10a. Moreover, the court of appeals was not charged with reviewing Benton's testimony in isolation; it was reviewing the district court's decision for clear error based on all the evidence in the record. And for that reason, ATF does this Court a considerable disservice by presenting this case as though Benton were the only witness. See Pet. 24-25. Both sides presented evidence to the district court, and all of that evidence weighs in the balance when evaluating the propriety of its judgment.

Even ATF does not claim that the district court was obligated to credit Benton's testimony no matter how implausible it seemed. Indeed, there is no authority (and ATF cites none) supporting the proposition that courts must credit the testimony of an agency's witnesses, especially when that testimony is controverted by other witnesses, including a former ATF official with experience similar to Benton's. To the contrary, the circuits are in agreement that the district court is not obligated to credit an agency's witnesses when their testimony is controverted by other evidence in the record. See, *e.g.*, *Silets v. United States Department of Justice*, 945 F.2d 227, 231 (7th Cir. 1991) (en banc), cert. denied, 505 U.S. 1204 (1992); *American Friends Service Committee v. Department of Defense*, 831 F.2d 441, 444 (3d Cir. 1987); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). After all, as we explain above, under FOIA the agency bears the burden of proof, not merely a burden of coming forward with evidence, and it is up to the district court to evaluate the agency's showing de novo, rather than affording it only limited or deferential review. That rule

was correctly applied in this case. Even if Benton's speculation is "comprehensive and highly detailed," Pet. 24, it is still speculation, and need not be credited in the face of the testimony that we adduced—all from present or former law enforcement officials—who explained why, in their experience and professional judgment, disclosure of the information at issue here was not reasonably likely to interfere with law enforcement proceedings.

Moreover, the argument for deference to agency expertise is especially weak in a case such as this one, where the agency does not actually conduct the investigations that it claims would be impeded by disclosure. In fact, 97% of all traces are performed at the request of agencies other than ATF. See R. 34, Ex. F ¶ 9. And ATF's own witnesses had no actual investigative responsibilities. Surely it is not too much to expect that if ATF attempts to carry its burden of justifying an exemption by proving that disclosure of trace data "would reveal, with respect to each of more than one million investigations, a variety of sensitive law enforcement information," Pet. 19, it should support that dire prediction with testimony from at least some law enforcement officials who actually do the investigations at issue. Yet ATF proffered no testimony or even unsworn expression of concern from anyone representing the FBI, the DEA, or, indeed, any other federal, state, or local law enforcement agency. In fact, the only evidence in the record from law enforcement officials with actual investigative responsibilities is evidence ATF ignores, and it confirms that disclosure of trace data is not likely to prejudice ongoing investigations. See R. 35, Ex. K, L, M; R. 38, Ex. P. Significantly, no law enforcement organization appeared to support ATF as amicus below, and even now, the only law enforcement amicus support for ATF comes from the Fraternal Order of Police—a labor organization.

On this record, accordingly, the court of appeals correctly concluded that the district court did not clearly err in rejecting

ATF's "far-fetched hypothetical scenarios" precisely because they did not identify a "substantial, realistic risk of interference." Pet. App. 18a. Indeed, we quite agree with ATF that Exemption 7(A) should be "given a workable and pragmatic construction." Pet. 27. In truth, that principle better than any other demonstrates that the district court did not clearly err in this case. While ATF's witness Benton was willing to speculate that release of the trace data might somehow enable a subject to obstruct an investigation, the "pragmatic" reality is that release of this data is unlikely to compromise anything of any real importance. And, of course, the holding below leaves ATF free to claim Exemption 7(A) for specific traces in future litigation by showing that they contain sensitive information about a particular ongoing investigation.

ATF complains that the court of appeals failed to honor the holding in *Robbins Tire* that an agency "may rely on reasonable categorical judgments and is not required to establish that release of the withheld information would interfere with a *specific* existing or contemplated law enforcement proceeding." Pet. 25-26 (emphasis in original). But the court's opinion embraced the *Robbins Tire* standard, while concluding that ATF had failed to demonstrate that "disclosing the requested records puts the integrity of any *possible* enforcement proceedings at risk." Pet. App. 8a (emphasis supplied). And in denying ATF's petition for rehearing, the court made plain that ATF's testimony had established at most "a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable*." Pet. App. 18a (emphasis in original). This approach tracks Exemption 7(A) precisely, as even ATF ultimately acknowledges. See Pet. 26.[10]

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[10] ATF also complains that the court of appeals effectively required it to prove the impossible, by showing that data it has never released have been used to obstruct investigations. See Pet. 25. In fact, the record

ATF argues that the decision below imposes evidentiary burdens on ATF "so demanding that they would effectively subvert ATF's ability to employ the 'categorical' approach to the implementation of Exemption 7(A) that was approved by this Court in *Robbins Tire*." Pet. 27. But when, as here, the information at stake is almost always already known to an investigation's targets and other third parties, an agency's ability to engage in hypothetical speculation that disclosure of the information would interfere with law enforcement proceedings will not satisfy Exemption 7(A). Indeed, as this Court concluded when it refused to presume that all information obtained from witnesses during the course of criminal investigations should be treated as confidential and therefore exempt from disclosure under FOIA, "the proposed rule is not so much categorical as universal . . . ." *United States Department of Justice v. Landano*, 508 U.S. 165, 175 (1993). And the type of presumption that ATF in effect advocates is surely wholly unwarranted when, as here, the data at issue "can range from the extremely sensitive to the routine." *Id.* at 176.

A far more concrete showing than ATF made here has always been required under Exemption 7(A), as even the cases cited by ATF make plain. For example, *Manna*, *Swan v. SEC*, 96 F.3d 498 (D.C. Cir. 1996), and *Lewis v. IRS*, 823 F.2d 375 (9th Cir. 1987), hold that a district court did not

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shows that ATF has released trace data on numerous occasions in the past to advocacy groups, journalists, and even purchasers. See R. 25, Ex. F, G; R. 35, Ex. J, ¶¶ 8, 10, 12; R. 47, Ex. C, ¶ 8. Yet ATF could neither show that these prior releases had harmed any investigation, nor explain why they were any less likely than the disclosure sought here to produce the results that ATF claims to fear. In any event, the court of appeals' holding ultimately rests not on ATF's failure to show past interference with investigations, but on its conclusion that ATF had not provided a reasonable basis to support its speculative fear of disclosure, and as we explain above, that approach is consistent with Exemption 7(A). See Pet. App. 10a, 18a.

clearly err when the information at issue related to the nonpublic details of a specifically identified ongoing investigation. See *Swan*, 96 F.3d at 500; *Manna*, 51 F.3d at 1164-65; *Lewis*, 823 F.2d at 378-79. And in *North v. Walsh*, 881 F.2d 1088 (D.C. Cir. 1989), the court held that Exemption 7(A) did not shield from disclosure information related to portions of a criminal investigation that had already been closed and, on the balance, directed the district court to consider "whether disclosure can reasonably be expected to interfere in a palpable, particular way" with an investigation that is still open. *Id.* at 1100. None of these cases remotely suggests that a district court is obligated to credit the kind of testimony on which ATF relies here—testimony in which no particular ongoing investigation is identified, even for illustrative purposes, and where the data sought does not reveal confidential details, such as names and addresses of witnesses, descriptions of evidence, or memoranda discussing investigative strategies and tactics. In addition, the case law explains that when the information at issue is likely to already be known to the subjects of an investigation, a claim to Exemption 7(A) is particularly weak. See, *e.g.*, *Campbell v. HHS*, 682 F.2d 256, 265 (D.C. Cir. 1982). And the ample case law in this area reflects no confusion or disagreement in the lower courts that requires plenary review to clarify the scope of Exemption 7(A).

ATF offers the further claim that this decision may deter other law enforcement agencies from requesting firearms traces. See Pet. 29. But any legitimate concerns raised by the decision below are easily addressed. If a law enforcement agency requesting a trace has a real concern about disclosure of the results of that particular trace request, and if the trace is not already specially coded by the requesting agency, then, as a part of the trace request, the requesting agency need only apprise ATF of the reason that the trace is sensitive. Under the case law we discuss above, a tailored claim under Exemption 7(A), based not on the unrealistic presumption that all

traces are sensitive but instead supported by the particularized concerns of the jurisdiction conducting the investigation will suffice under Exemption 7(A). Thus, law enforcement agencies with legitimate concerns about particular traces need not fear the decision below. It will, however, force ATF to bring its FOIA policies into line with those of all other federal agencies, rather than resting on an unrealistic presumption that all traces are sensitive.[11]

3. The preceding discussion should make plain that the exceedingly fact-bound dispute in this case does not warrant plenary review. Moreover, there are special factors that counsel against review. First, as we explain above, ATF's arguments depend heavily on the weight to be given to the testimony of its principal witness, Benton. The district court, however, found his testimony unpersuasive, and the court of appeals sustained that finding. This Court is especially reluctant to review cases that challenge the factual findings of a district court that have, in turn, been sustained on appeal. See, *e.g.*, *Exxon Co. U.S.A. v. SOFEC, Inc.*, 517 U.S. 830, 840-41 (1996); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Berenyi v. District Director*, 385 U.S. 630, 636 (1967); *Blau v. Lehman*, 368 U.S. 403, 408-09 (1962); *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). The "two court" rule argues powerfully against plenary review here.

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[11] The Solicitor General adds that ATF has "informed" him that more than 40 police departments have signed memoranda of understanding with ATF requesting that "the law enforcement sensitive firearms trace information generated pursuant to the Agreement shall not be disclosed without the consent of both parties to the agreement." Pet. 29. The Chicago Police Department informs us that it is ATF itself that solicits these agreements in return for offering its own cooperation. These agreements thus reflect no spontaneous expression of concern by other law enforcement agencies—none of which has filed a brief in support of ATF either here or in the court of appeals—but only ATF's effort to pressure local police departments to support its litigation strategy.

Second, ATF itself notes that Congress is considering legislation addressed to disclosure of trace and multiple sales data under FOIA. See Pet. 21-22 n.11. This fact, too, counsels against plenary review. Since Congress is even now studying the matters raised by the petition, this is alone a particularly strong reason for this Court to deny review. We are unsure of the meaning and effect of the particular legislation to which ATF refers, but surely if ATF presents a more powerful case to Congress than it presented to the district court, Congress will enact appropriate legislation. If, conversely, new legislation ultimately stalls or is defeated, that will suggest that Congress has concluded that ATF's concerns about the decision below are, at best, exaggerated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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